



April 28, 2000

Mr. Terrence S. Welch  
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.  
1717 Main Street  
Dallas, Texas 75201-4335

OR2000-1673

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Texas Government Code. Your request was assigned ID# 134573.

The Town of Flower Mound (the "town") received a request for information related to an arrest, including personnel information relating to the arresting officer. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and have reviewed the submitted representative sample of information.<sup>1</sup>

We first note that information filed with a court is generally a matter of public record and may not be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). You have provided us with an arrest warrant, a probable cause affidavit, and a magistrate's warning which have apparently been filed with a court and not been otherwise made confidential; the town must release all such documents.

Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. You state that the requested information relates to a pending criminal investigation.

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Accordingly, we find that release of the requested information would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we conclude that the department may withhold most of the requested information under section 552.108(a)(1). However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, the town may withhold the requested information relating to the arrest from disclosure based on section 552.108(a)(1). We believe that this would be information responsive to request item numbers 8 through 10 and 12 through 18. We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

We do not believe, however, that you have demonstrated how or why the information requested in items 1 through 7 and 11 should be withheld under section 552.108. See, e.g., Open Records Decision Nos. 553 (1990), 413 (1984), 143 (1976), 127 (1976); cf. Open Records Decision Nos. 216 (1978), 133 (1976) (release of routine investigation procedures, techniques that are commonly known, and routine personnel information generally do not interfere with law enforcement and crime prevention). We do not believe that the exception applies to some of the documents which merely reveal information pertaining to the personnel matters of an individual officer. Such information only indirectly "deals with the detection, investigation, or prosecution of crime" and more directly deals with personnel matters. See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.--El Paso 1992, writ denied) (where no criminal investigation or prosecution results from investigation of police officer for alleged misconduct, section 552.108 is inapplicable); Open Records Decision No. 350 (1982).

Nevertheless, section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy in conjunction with section 552.101 of the Act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 552.101 also encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found.*, 540 S.W.2d at 685. Information may be withheld from the public when

(1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.*; Open Records Decision No. 611 at 1 (1992). This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the *Industrial Foundation* test. *See* Open Records Decision Nos. 600 (1992) (federal tax Form W-4, Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). Information derived from intelligence or psychological testing is also highly intimate or embarrassing about which the public has no legitimate concern. ORD 600 at 5-6. We have examined the documents and have marked the information that the town must withhold under common law privacy, sections 552.101, and 552.102.

Some of the submitted documents are medical records that are protected from disclosure under the Medical Practice Act (the "MPA"). The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b); *see* Open Records Decision No. 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Thus, the submitted medical records may only be released in accordance with chapter 159 of the Occupations Code. *See* Occ. Code §§ 159.002(c), 159.004, 159.005; *see also* Open Records Decision No. 598 (1991) (in governing access to specific subset of information, Medical Practice Act governs over more general provisions of the Public Information Act). Additionally, the personnel file contains a form entitled "L-2 declaration of Medical Condition" along with medical records that must be withheld pursuant to Occupations Code section 159.002.

Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). The submitted personnel file contains a confidential psychological report. This information is protected by section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

The personnel file also contains a polygraph examination report. Section 1703.306 of the Texas Occupations Code (formerly section 19A of article 4413(29cc) of the Texas Civil Statutes) provides that information acquired from a polygraph examination is confidential and governs the release of that information. The town must withhold the polygraph information.

The submitted documents contain social security numbers that may be confidential if they were obtained or are maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990. 42 U.S.C. section 405(c)(2)(C)(viii); *see* Open Records Decision No. 622 (1994). Further, section 552.117(2) excepts from disclosure information that relates to the home addresses, home telephone numbers, and social security numbers of police officers and information that reveals whether the officer has family members. We have marked the information the town must withhold.

Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1998). The submitted documents contain a photograph depicting a peace officer and it does not appear that any of the exceptions are applicable. Moreover, you have not stated that the peace officer has executed a written consent to disclosure. Absent a written waiver, the town must withhold the officer's photograph.

Section 552.130 of the Government Code excepts information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Section 552.130, by its terms, only applies to motor vehicle information issued by the State of Texas. We have marked the information that the town must withhold under sections 552.130 and 730.004.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

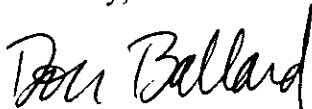
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Don Ballard  
Assistant Attorney General  
Deputy Chief, Open Records Division

JDB/CHS/ljp

Ref: ID# 134573

Encl. Submitted documents

cc: Mr. J.T. Borah  
Attorney at Law  
335 West Main Street  
Lewisville, Texas 75057  
(w/o enclosures)